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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

CITY OF VERNON,
Petitioner,
v.
SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GIBSON, DUNN & CRUTCHER
PAUL G. BOWER
ARTHUR L. SHERWOOD
GARY M. JOYE
2029 Century Park East
Suite 4000
Los Angeles, California 90067
Telephone: (310) 552-8500

BRYANT C. DANNER
STEPHEN E. PICKETT
JANET K. LOHMANN
2244 Walnut Grove Avenue
Rosemead, CA 91770
Telephone: (818) 302-3844
Attorneys for Respondent Southern California Edison Company

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

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Pursuant to Sup. Ct. R. 29.1, Respondent Southern California Edison Company states that it is a public utility, that its parent holding company is SCEcorp, and that it has no subsidiary companies (other than wholly-owned subsidiaries).

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly conclude that a regulated electric utility was not liable under Section 2 of the Sherman Act for refusing to allow additional access to its transmission lines when the admitted effect of providing the demanded access would be a shift of benefits to the entity seeking access with a corresponding increase in costs to the utility's remaining customers?

2. Did the Court of Appeals correctly conclude that an antitrust plaintiff could not sustain an action for treble damages when its only proof of damages is fatally flawed because, *inter alia*, it failed to provide a means to segregate the losses, if any, caused by acts which were antitrust violations from those acts which were not antitrust violations?

II.

STATEMENT OF THE CASE

A. Introduction

Vernon's Petition For Writ of Certiorari does not raise any issue of extraordinary importance pertaining to antitrust law or the electric utility industry. As the Court of Appeals properly viewed it, this is a straight-forward case of an antitrust plaintiff who failed to provide any evidence sufficient to raise a triable issue as to two *essential elements* of its Section 2 claim for damages: (1) lack of any valid business justification for the conduct alleged to be unreasonable and anticompetitive; (2) proof of damages caused by antitrust violations.

Only through a distortion of the record[1] and the rulings of the courts below is Vernon able to see anything remarkable in this case. Viewed in the guiding light of the undisputed facts and well-established legal precedent, Vernon's antitrust case can be seen — as the courts below have seen it — for what it really is: a

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[1]The numerous misstatements of the record are treated more fully below. It should be noted at the outset, however, that Vernon's Petition For Writ of Certiorari ("Pet.") cites materials that were not even before the courts below in connection with their summary judgment rulings. Vernon, for instance, cites material that was not submitted until after the summary judgment rulings and in connection with Vernon's motion for reconsideration — which was denied by the District Court. (*See* Pet. at 4 n.5, to "O'Malley Decl.") The Court of Appeals affirmed the denial of that motion (Pet. App. at 7 n.7) and Vernon does not seek review of that ruling. Vernon also cites [and includes in its Appendix to Petition for Writ of Certiorari ("Pet. App.") at 73 *et seq.*] excerpts of a decision from an unrelated proceeding before the California Public Utilities Commission (CPUC). (*See* Pet. at 12 n.32 & n.33, 14 n.37, and 23 n.48.) Those excerpts were not before the courts below; and Vernon never even requested that the courts below give collateral estoppel effect to any rulings in the "CPUC Merger Case." Finally, Vernon refers to (Pet. at 5 n.5, 12 n.31) FERC rulings on the Integration Operations Agreements ("IOAs") offered to resale customers, even though the Court of Appeals remanded the case on the Vernon's IOA claim and the FERC rulings on the IOA have nothing to do with this petition.

factually unsupportable case grounded in fundamentally flawed legal theories and thus perfectly suited for summary judgment.

B. Vernon's Complaint And The Proceedings Leading To The Summary Judgment Rulings At Issue Here.

Vernon's complaint alleges that Edison has violated both Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), by engaging in a course of conduct commencing in 1961 and continuing to the present. Vernon's Section 2 "foreclosure damage" claim, the only claim at issue in Vernon's Petition For Writ Of Certiorari, alleges that Edison improperly restrained Vernon from purchasing bulk power from suppliers other than Edison by denying Vernon access to its transmission network.

On November 13, 1989, Edison filed a motion for summary judgment seeking dismissal of Vernon's foreclosure damage claims. CR 175.[2] At that time, all discovery in the case had been completed and the case was on the verge of trial. Vernon also filed, on November 13, 1989, two motions for partial summary judgment seeking a judicial determination that Edison's entire transmission network constituted an "essential facility," and that Vernon and Edison were engaged in "franchise competition." CR 183, 184. Vernon and Edison also filed several motions *in limine* at that time. With the consent of the parties, the District Court considered all of these motions and their accompanying evidentiary support in ruling on Edison's foreclosure damages summary judgment motion.

On March 1, 1990, the District Court granted Edison's motion for summary judgment on Vernon's Section 2 foreclosure damage

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[2]The citation "CR _____" is to the docket number assigned to the material in the Clerk's Record. The cited evidence is further identified as to its source on those occasions when it refers to an admission in response to a Request for Admission ("RFA") by Vernon or to a statement by Whitfield A. Russell, the author of Vernon's damage study.

claims. CR 263.[3] On August 30, 1990, the District Court filed its "Findings of Facts and Conclusions of Law in Support of its Order Granting Edison's Motion for Summary Judgment on Plaintiff's Foreclosure Claims" ("District Court Findings Of Fact"), Pet. App. at 25 *et seq.*[4] On *de novo* review, the Ninth Circuit Court of Appeals affirmed in all respects that are pertinent to Vernon's Petition For Writ Of Certiorari. *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361 (9th Cir. 1992) (Pet. App. at 1-23).

C. Statement Of Relevant Factual Background To Summary Judgment Rulings.

The District Court's decision granting summary judgment for Edison, and the Ninth Circuit's opinion affirming it, should be viewed against the following undisputed factual backdrop that was presented to those courts.[5]

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[3]The District Court further denied Vernon's motions premised on the essential facility doctrine and its claims of franchise competition. *Id.* The Court declined to rule on the various motions *in limine*.

[4]On September 17, 1990, Vernon filed a Motion for Reconsideration of the District Court's March 1 Order dismissing its foreclosure damage claims. CR 297. In support of that motion, Vernon submitted additional exhibits and once again sought to reargue its foreclosure damage claims. CR 298. The District Court denied this motion for reconsideration (CR 310) and the Court of Appeal affirmed that denial. Pet. App. at 7 n.7.

[5]This factual background is based primarily on the District Court's Findings Of Facts (Pet. App. at 25 *et seq.*). It also is based in part on the District Court's "Memorandum of Decision Granting Motion for Summary Judgment with Respect to [Vernon's] Rate Filing and Group Boycott Claims" (hereinafter "District Court Decision Re Rate Filing/Group Boycott Claims") [reported at *City of Vernon v. Southern California Edison Co.*, 1990-1 Trade Cases (CCH) ¶ 69,032 (C.D. Cal.), *aff'd* 955 F.2d 1361, 1371 (9th Cir. 1992)].

1. Overview Of Edison's Operations And The City Of Vernon.

Edison provides both retail and wholesale electric service in Central and Southern California within a certificated service territory approved by the California Public Utilities Commission ("CPUC"). Edison's retail rates and the terms of service to its retail customers are regulated by the CPUC.[6] Edison's wholesale (resale) rates, and any agreements between Edison and its wholesale (resale) customers, including Vernon, regarding wholesale service or transmission, must be filed with, and approved by, the FERC.[7] Edison cannot legally charge a rate or provide a service other than that specified in the filed tariff.[8]

The city of Vernon is a California municipality located within Edison's service territory that owns a distribution system through which it provides electricity to its industrial retail customers living within the city limits. Vernon shares common boundaries with Edison's service territory, as well as with the City of Los Angeles which maintains its own service territory through the Los Angeles Department of Water and Power ("LADWP").[9]

2. Edison's Transmission Network.

Edison's transmission lines are part of an interconnected network that links it with other utilities located throughout the Western United States. Since 1978, Edison has increasingly relied upon distant generating resources, and its electric interconnections with other systems, to acquire the power necessary to meet its total load requirements. Edison has devoted substantial effort to identifying and obtaining low-cost power resources to reduce its customers' overall costs of service. For example, in the early 1960's, Edison began its participation in an EHV (Extra High Voltage) transmission project linking Southern California with

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[6]District Court Findings of Fact, ¶ 2.15 (Pet. App. at 28). *See also* Cal. Pub. Util. C. §§ 451 *et seq.*, 726 *et seq.*

[7]*Id.*, ¶ 2.16 (Pet. App. at 29).

[8]*Id.*; *see, e.g.*, 16 U.S.C. §§ 824d, 824e.

[9]District Court Findings Of Fact at ¶ 2.7 (Pet. App. at 27).

the Pacific Northwest, known as the Pacific Intertie. The Intertie was designed to harness surplus power resources generated in one area to meet the needs of uses located in other regions.[10]

In addition to the Pacific Intertie, Edison has interests in EHV transmission lines extending to the Southwest United States. These facilities include lines extending from the Los Angeles Basin to Nevada, Arizona, and the "Four Corners" region of New Mexico. The remaining portion of Edison's transmission facilities consists of a network of 220- or 230-Kv transmission lines in the greater Los Angeles metropolitan area.[11] This transmission network connects with the lines of a number of other major utilities, including LADWP and the California Department of Water Resources ("CDWR").[12]

3. Vernon's Access To Edison's Transmission Lines.

Edison offers transmission service to its resale customers whenever it will not harm the economic interests of its customers or the reliability of its system.[13] Whenever Edison has had unused

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[10]District Court Findings Of Fact, ¶ 2.11, 2.12 (Pet. App. 28).

[11]Response to RFA No. 565, CR 177 at 560.

[12]District Court Findings of Fact, ¶ 2.14 (Pet. App. at 28).

[13]CR 200 at 86-88, 103; Response to RFA No. 733, CR 177 at 598. Pursuant to the 1972 settlement agreements between Edison and the Resale Cities, Edison and the Resale Cities have entered into "generic" Integrated Operations Agreements ("IOA's") and matrix agreements allowing them "to use Edison's EHV lines whenever excess unused capacity is available and when systems conditions permit the importation of this energy." *See* District Court Decision Re Rate Filing/Group Boycott Claim, *supra* [1990-1 Trade Cases (CCH) ¶ 69,032, at 63,663]. Those IOA's extend to City-owned resources (as well as purchased power) and provide that Edison will use its "best efforts" to provides EHV transmission service on its lines, and is obligated to provide network services even if that requires building new lines for integrated resources. Hence Vernon's characterization of the generic IOA's as providing "highly restricted access to its integrated network (but none on Edison's EHV lines)" (Pet. at 7) is incorrect.

capacity either on its 220-Kv network or on its EHV transmission lines, for example, it has made firm transmission service available to the resale Cities.[14] Indeed, throughout the entire period for which damages are claimed in this action, Edison has provided firm 220-Kv network transmission service when Vernon has requested it.[15] Edison also has provided firm transmission service over its EHV transmission lines for Vernon's entitlements in two generating facilities lying outside of the Southern California Basin, i.e., the Hoover Dam facility in Nevada and the Palo Verde Nuclear Generating Station in Arizona.[16] Vernon is thus incorrect in asserting (Pet. at 9) that "Edison has always refused to grant Vernon any firm access to its EHV lines to reach any of the bulk power markets in the southwest."

Edison also provides interruptible transmission service ("ITS") to its wholesale customers whenever it will not harm system reliability or have an adverse impact on its retail or native load customers.[17] Edison has offered its resale customers, including Vernon, ITS over its EHV lines, including the Intertie, since at least 1978.[18] Vernon has in fact economically used ITS provided by Edison in meeting its energy needs.[19]

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[14]CR 196 at 3-4, Issue Nos. 6 & 8; District Court Decision Re Rate Filing/Group Boycott Claims, [1990-91 Trade Cases (CCH) ¶ 69,032, at 63,662-3).

[15]*See, e.g.,* Response to RFA Nos. 731-33, CR 177 at 597-98.

[16]CR 200 at 43-44; CR 211 at 61, ¶ 4; CR 177 at 525-27; CR 184 at 127-29.

[17]CR 193 at 259-61; CR 200 at 86-88, *see also* District Court Decision Re Rate Filing/Group Boycott Claims [1990-91 Trade Cases (CCH) ¶ 63,032, at 63,663].

[18]Response to RFA Nos. 594, 597, CR 200 at 574, 576; *see also* District Court Decision Re Rate Filing/Group Boycott Claims [1990-91 Trade Cases (CCH) ¶ 63,032, at 63,663].

[19]District Court Findings Of Fact, ¶¶ 2.35-2.37, 2.42-2.46 (Pet. App. at 32-33); Response to RFA No. 726, CR 177 at 596. *See also* CR 200 at 49.

4. Vernon's Bulk Power Resources.

Edison has the responsibility to supply Vernon with all the power it needs at FERC approved prices. There is no claim that Edison has not met this responsibility. In addition, Vernon has used both interruptible and firm transmission service furnished by Edison to decrease substantially its dependence upon Edison for its power needs. As the district court found: "In 1983 Vernon bought nearly all of its electricity from Edison. By 1987, it was purchasing less than one-half of its requirements from Edison."[20] As of 1989, of its peak requirements, Vernon obtains over 92% of its capacity from non-Edison sources.[21] Vernon's suggestion of dependence on Edison (Pet. at 6-9) is belied by these undisputed facts.

D. Vernon's Section 2 "Foreclosure Damage" Claims.

Vernon's foreclosure damage claim alleges that Edison unlawfully restrained Vernon from purchasing bulk power from suppliers other than Edison by denying Vernon access to its transmission lines. Vernon contends that the antitrust laws require Edison to give Vernon additional transmission service over all of its EHV lines, including the Pacific Intertie and those lines extending to the Desert Southwest, as well as unconstrained and unlimited transmission service over Edison's 220-Kv network. Edison's failure to provide this comprehensive service, according to Vernon, forced Vernon to purchase wholesale power from Edison at prices higher than it would otherwise have had to pay.[22]

Vernon's damage study sets out the parameters of Vernon's foreclosure claims. Vernon calculates the damages resulting from Edison's allegedly illegal conduct as the difference between the rate Edison charged Vernon for power and that which Vernon contends it would have paid in the absence of any foreclosure.

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[20]District Court Findings Of Fact, ¶ 2.41 (Pet. App. at 33).

[21]District Court Findings Of Fact ¶¶ 2.42, 2.43, 2.46 (Pet. App. at 33).

[22]District Court Findings Of Fact ¶ 3.1 (Pet. App. at 34).

Vernon quantified these "overcharge" claims in a damage study, which pursuant to a procedural schedule established by the District Court, was "the final version of Vernon's damage study," and "the only one which could have been presented by Vernon at trial."[23] The fundamental assumption of this damage study is that Edison is obligated to provide Vernon with what it terms as "relative size share" firm access to Edison's high-voltage transmission lines as well as unconstrained access to its 220-Kv network.[24]

Vernon's claim (Pet. at 3-4 n.4) that Edison's network "has excess capacity" to supply transmission to Vernon and others is contrary to the access scenario in Vernon's own damage study which was predicated on the assumption that the line was fully utilized. Because this scenario was assumed by the parties, the District Court and the Court of Appeals as Vernon's "request" for transmission access, any claim of denial of access when there was "excess" capacity is outside the scope of the assumptions underlying the summary judgment motion.

E. The District Court Decision.

The District Court granted summary judgment on Vernon's foreclosure claims on several grounds. As to Vernon's claims that it was entitled to "relative size share" firm access to Edison's transmission lines, the District Court determined that Edison had established a legitimate business reason for its refusal to provide the requested access.[25]

At the outset, the District Court found, and Vernon does not dispute here, that "Vernon has never made a formal request to Edison for relative size share firm transmission access."[26] Nevertheless, the District Court addressed the merits of Vernon's

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[23]District Court Findings Of Fact 3.3 (Pet. App. at 34). This damage study was not, as Vernon suggests, "admitted into evidence."

[24]*Id.* at 3.6 (Pet. App. at 35).

[25]*Id.* at ¶¶ 7.1-7.5 (Pet. App. 42-43).

[26]*Id.* at 3.13 (Pet. App. 36).

claims on the assumption that if Vernon had demanded the access assumed in the damage study, the request would have been refused. The District Court also assumed, only for purposes of the summary judgment, that Edison had monopoly power and its transmission lines were essential facilities.[27] The District Court thus addressed whether given this assumption, Edison violated the antitrust laws by refusing to give Vernon all of the access to facilities that it demanded.

The District Court determined there was no genuine issue of material fact with respect to Edison's assertion of a legitimate business justification for refusing relative size share access because: "Vernon has conceded that if Edison granted Vernon the access it has demanded, the costs for Edison's other customers would increase. Even assuming competition exists between Edison and Vernon, Edison is not obligated by the antitrust laws to confer a benefit on Vernon at the expense of its own customers."[28] Despite Vernon's present expression of doubt as to whether retail rates would have increased (Pet. at 3 n.3), this was admitted below by Vernon.[29]

The District Court determined Vernon did not point to any facts in opposition that would create a material issue of fact as to Edison's legitimate justification. Although Vernon now contends that the courts below "disregarded Vernon's evidence" that the asserted business justification was "pretextual,"[30] the District Court determined,[31] as did the Ninth Circuit,[32] that *no* such

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[27]*Id.* at ¶¶ 5.4, 5.5 (Pet. App. 39). Vernon incorrectly states that Edison "conceded" its transmission network is an "essential facility." See Vernon's Brief at 3.

[28]*Id.* at ¶ 7.3 (Pet. App. at 42-43).

[29]*Id.*, at ¶¶ 3.18 (Pet. App. at 36-37), 7.3 (Pet. App. at 42).

[30]Vernon Pet. at 4, 9-10, n.26.

[31]District Court Findings of Fact, ¶¶ 7.3-7.5 (Pet. App. at 42-43).

[32]955 F.2d 1366 (Pet. App. at 10).

evidence was produced. Moreover, the District Court's opinion does not, as Vernon suggests (Pet. at 9), state that the resultant increase in retail rates from granting Vernon "relative share access" was the result of competition between Vernon and Edison. As the District Court found, and Vernon itself conceded, the increase in retail rates derives from increased costs to the retail ratepayer as low cost power is shifted away from Edison's other customers to Vernon. Rate making procedure, not competition, causes this shift.[33]

F. The Court Of Appeals Decision.

1. Rulings Rejecting Liability Under Sherman Act § 2.

On *de novo* review, the Court of Appeals affirmed the District Court's granting of summary judgment on Vernon's foreclosure damage claim. As to Vernon's claim for "relative size share access," the Court of Appeals ruled that "Vernon did not point to any facts in opposition to Edison's motion for summary judgment which would create a material issue of fact" as to Edison's assertion of a "legitimate business justification for refusing [such access]." 955 F.2d 1366 (Pet. App. at 10).[34] Instead, the Court of Appeals noted, "Vernon asserted that Edison's business justification was insufficient as a matter of law" and, alternatively, that "if the asserted justification was not insufficient as a matter of law, a jury should be permitted to decide whether a slight increase in retail prices to Edison's customers was a legitimate business reason for Edison's refusal to grant relative size share transmission access." *Id.* (Pet. App. at 9-10).

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[33]*See* District Court Findings Of Fact, ¶¶ 3.16-3.18 (Pet. App. at 36-37).

[34]Hence, the Court of Appeals affirmed the District Court's conclusion that Vernon's proferred evidence did not create a factual issue as to "pretextuality." That the Court "did not say why Vernon's evidence of pretextuality was insufficient" (Pet. at 10 n.26) is explained by the fact that there was no such evidence.

The Court of Appeals stated that, "[a]t the time of the summary judgment, Vernon did not appear to dispute the fact that retail customers would pay increased rates if it received the access sought — indeed, Vernon's damage study reflected that fact. Nor did Vernon appear to dispute the fact that Edison was legitimately concerned about retail rates in making its facilities access decisions." *Id.* (Pet. App. at 10). And citing its companion decision filed the same day, the Court of Appeals held: "It is legitimate for Edison to refuse access that will affect its rates to the detriment of its customers." *Id. citing City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1381 (9th Cir. 1992).[35]

The Court of Appeals ruled that Vernon "has the burden of proving that [Edison] acted without a legitimate business justification. 955 F.2d at 1366 (Pet. App. at 10). And, to survive summary judgment, Vernon was required to, but failed to, point to evidence demonstrating that there was a genuine issue of fact as to whether Edison in fact acted on the asserted grounds. The Court added that "Vernon fails to demonstrate just why Edison is required to cease using its own facility so that Vernon can begin using it. This is not a situation where Edison has no use for the facility and arbitrarily denied someone else its use. Nor is it a case where Edison simply refused to supply Vernon its power needs." *Id.* (Pet. App. at 10-11) (citations omitted).

The Court of Appeals further ruled that "even had Vernon offered some evidence which raised a material issue of fact with respect to Edison's reasons for refusing relative size share access, we can find no authority — and Vernon has pointed to none — which supports Vernon's theory that 'reasonable' access must take the form of relative size share access." *Id.* at 1367 (Pet. App. at 11). The Court added: "Even more to the point, Vernon admits that it never requested relative size share access to Edison's transmission facilities." 955 F.2d 1367 (Pet. App. at 11)

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[35]Thus, the Court of Appeals, like the District Court, explicitly addressed, rather than "disregarded" (Pet. at 10), the "legitimate competitive justification" for Edison's conduct.

2. Ruling Dismissing Antitrust Claims For Inadequate Proof Of Damages.

The Court of Appeals also affirmed summary judgment in Edison's favor on the foreclosure claims "for the independent reason" that "Vernon presented the court with a damage study which was, at best, seriously flawed." *Id.* at 1371 (Pet. App. at 19). The Court ruled that "the only possibly admissible damage study" before the Court "failed to segregate losses, if any, caused by acts which were not antitrust violations from those which were." *Id.* at 1372 (Pet. App. at 21). The Court added that "Vernon's deeply flawed study is the handmaiden of its equally flawed theory that it should have proportionate firm access to Edison's whole system at all times." *Id.*

The Court of Appeals further concluded that it had "no confidence" in the possibility that Vernon could repair its "seriously flawed" damages study, stating: "Vernon insists that all of Edison's acts contributed to the damage figures but the district court and we have already found that many of those acts were proper." *Id.* at 1372 (Pet. App. at 22). The court thus "agree[d] with the district court that the serious flaws in the only damage study which would be proffered to the jury placed Vernon in the position of having no proper proof of damages at all." *Id.*

III.

THE COURT SHOULD DENY VERNON'S PETITION FOR WRIT OF CERTIORARI

A. Introduction.

The Court of Appeals rulings at issue here are grounded in clear and correct reasoning and undisputed facts. This case only becomes extraordinary by virtue of Vernon's distortions of those rulings, the record, and applicable law.

1. The Court Of Appeals Rulings Regarding The Inadequacy Of Vernon's Damage Study, Which Are Essentially Unchallenged By Vernon, Provide An Independent Basis For Denying The Writ.

As an independent ground for summary judgment on Vernon's antitrust claim, the Court of Appeals properly ruled that the "serious flaws" in "the only damage study which could be proffered to the jury" placed Vernon in the position of having no proper proof of damages — and hence unable to establish any essential element of a § 2 claim for damages. 955 F.2d 1373 (Pet. App. at 22). Vernon's petition does not even address, much less assail, the Court of Appeals ruling that Vernon damage study was "seriously flawed" by its failure to "segregate the losses, if any, caused by acts which were not antitrust violations from those that were." *Id.* at 1372 (Pet. App. at 21). Nor does Vernon dispute the court of appeals' finding that "Vernon would not or could not" make corrections to properly segregate the losses caused by antitrust violations. *Id.* Finally, Vernon cannot point to any authority contrary to the Court's ruling that Vernon needed to prove that its claimed damages were caused by illegal acts. Indeed, that ruling is in line with several authorities cited in the Court of Appeals decision (though ignored by Vernon's Petition). *See* 955 F.2d 1372-73 (Pet. App. at 19-22).

2. The Court Of Appeals Rulings On The Foreclosure Damages Claims Are Proper And Should Not Be Disturbed.

The Court of Appeals correctly concluded that an owner of a facility may legitimately use it for itself and need not give priority to a purported "competitor" without adversely affecting competition. Indeed, a contrary ruling would, in the words used by the Court of Appeals, "stand[ ] the essential facility doctrine on its head." 955 F.2d 1367 (Pet. App. at 11).

As both courts below recognized, the access that Vernon demands in its litigation posture necessarily is limited to situations in which Edison is fully utilizing its transmission lines to import low-cost power for the benefit of all its customers. When Edison is fully using its transmission lines, as the result of the utility ratemaking process, Vernon automatically receives a pro rata

share of the benefits of all low-cost power imports consummated by Edison. If Edison lost access to these low-cost power sources as a result of transferring transmission capacity to a third party such as Vernon, it would be forced to meet its load requirements by relying on more expensive generating resources. Use of these resources would cause economic harm to Edison's remaining customers because their costs of service would necessarily be higher.[36] In view of this undeniable shift of benefits and the detrimental impact on Edison's retail customers, it is quite clear why Vernon had to concede, as it did before the District Court, that the demanded access would have adversely affected Edison's remaining customers.

Vernon apparently now seeks to disavow this concession of adverse impact. (Pet. at 3) Hedging its bets, however, in the same breath Vernon concedes an impact, but asserts that it is competition, rather than an increase in costs, that could have caused it. (Pet. at 3-4) This assertion conflicts with the record and findings below. Vernon's concession was not that increased "competition" would have affected Edison's retail customers; rather, Vernon's position, fully confirmed by its own damage study, was that granting the access would have, as a result of the ratemaking process, increased costs to Edison's retail customers. Nor is the impact only in the short term as now claimed by Vernon. According to the Vernon's study, the adverse impact on Edison's retail customers would take place over the full period of Vernon's damage study. There is also no dispute that the cumula-

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[36]In setting rates at both the retail and wholesale levels, Edison's regulators use the concept of "rolled in" costs. A utility such as Edison relies on a number of generating resources, *e.g.*, its own generating sources and power purchased from other utilities, in order to meet its customers' requirements. The rates charged its customers are based upon an average of the costs associated with all its resources so that no one customer or group of customers receives only the benefits of the lower cost resources. The type of access demanded by Vernon would change this procedure to the detriment of Edison's other customers. *See City of Anaheim, supra,* 955 F.2d 1381.

tive impact on Edison's retail customers would be in the millions.[37]

B. Arguments Supporting Opposition To Vernon's Petition For Writ.

1. The Ninth Circuit Did Not Err In Ruling That The Impermissibly Speculative Nature Of Vernon's Damage Study Provided Independent Grounds For Dismissal Of Vernon's Section 2 Claim For Damages.

As the Ninth Circuit properly recognized, an antitrust plaintiff must not only demonstrate antitrust liability, but also provide a reasonable estimate of the amount of damages actually suffered. 955 F.2d 1372-73 (Pet. App. at 19-20); *see also Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1509 (9th Cir. 1985). Damage awards based on speculation or guesswork are expressly prohibited. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 808 (9th Cir. 1988). This proscription applies "even though the defendant by his own wrong doing has made precision impossible." *Zenith Radio Corp. v. Hazeltine Research*, 359 U.S. 100, 123-24 (1969).

The Court of Appeals properly concluded that "the only possibly admissible damage study before the Court"[38] was "at best seriously flawed." 955 F.2d 1371-72 (Pet. App. at 19). Specifically, "that study failed to segregate the losses, if any,

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[37]*See* CR 182 at 26-54. *See also* Russell Depo., CR 177 at 298; CR 182 at 55-62.

[38]955 F.2d 1372 (Pet. App. 21). The District Court did not, as Vernon suggests (Pet. at 4, 26 n.55), admit the damage study into evidence. The study was before the court only in connection with Edison's motion for summary judgment, and was not even offered by Vernon. Vernon's cited reference to the transcript of the District Court suggests only that the damage study would have been admitted into evidence had the case gone to trial. The District Court also stated, however, that it did not know what the jury would do, for example, if only one of Vernon's antitrust claims were valid or if the jury concluded that Edison had violated the antitrust laws in a way not modeled in the study. *See* CR 262 at 19.

caused by acts which were antitrust violations from those that were not." *Id.* at 1372 (Pet. App. at 21). Vernon "would not" and "could not" make corrections to properly segregate damages. *Id.*[39] Indeed, the author of Vernon's damage study admitted that if any of the assumptions underlying his calculations are incorrect or must be disregarded, the damages would necessarily be reduced, but he was unable to quantify by what amount.[40] Thus, as the Court of Appeals recognized, to the extent a jury concluded that some of the challenged conduct was legal, it could not make a damage award solely for the illegal conduct without engaging in impermissible speculation. 955 F.2d 1372-73 (Pet. App. at 21-22).[41]

In view of these serious, uncorrectable flaws in Vernon's proof of damages, which are unaddressed by Vernon's Petition, there can be little doubt as to the correctness of the Court of Appeals dismissal of the case on this ground alone.

Vernon's only challenge to the ruling on the inadequacy of its damage proof is to the Court's rejection of Vernon's theory — assumed by Vernon's damage study — that it should have proportionate firm access. This challenge, of course, does not address, and thus would not disturb, the primary grounds (as discussed above) underlying the Court of Appeals ruling rejecting Vernon's proof of damages. In any event, Vernon offers nothing to demonstrate the court erred in ruling that: "We can find no

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[39]Vernon instead insisted "that all of Edison's acts contributed to the damage figure." *Id.* at 1373.

[40]*See, e.g.,* Russell Depo. CR 177 at 141-42, 159-60, 197-203, 252-53, 398, 401, 404, 409-10.

[41]*Citing ILC Peripherals Leasing Corp. v. IBM Corp.,* 458 F. Supp. 423, 434 (N.D. Cal. 1978), *aff'd sub nom., Memorex Corp. v. IBM Corp.,* 636 F.2d 1188 (9th Cir. 1980), *cert. denied,* 452 U.S. 972 (1981); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.,* 786 F.2d 1342, 1352 (9th Cir. 1985). The District Court has also identified this danger as lurking within Vernon's study. The District Court's liability ruling in this case, of course, presages the likelihood of this problem actually occurring.

authority — and Vernon has pointed to none — which supports Vernon's theory that 'reasonable' access to Edison's facilities *must* take the form of relative size share access." 955 F.2d 1561, 1367 (9th Cir. 1992) (emphasis added).

2. The Ninth Circuit's Ruling That Edison Cannot Be Held Liable Under Section 2 Of The Sherman Act For Refusing To Allow Additional Access To Its Transmission Lines When The Admitted Effect Of Providing The Demanded Access Would Result In An Increase In Costs To The Utility's Remaining Customers Is In Accord With The Opinions Of This Court And With Those Of Other Circuits, And Antitrust Policy.

The § 2 liability issue posed below and here is whether Edison's failure to provide the access demanded by Vernon in its damage study breaches its obligations under Section 2 of the Sherman Act. Edison submits that nothing in the decisions of this Court or those of the circuits require Edison to provide such access.

As this Court has previously acknowledged, and the courts below relied upon, there is no general unqualified duty for a firm possessing monopoly power to assist its competition. *Aspen Skiing Co. v. Aspen Highlights Skiing Corp.*, 472 U.S. 585, 600-01 (1985). If the monopolist had a legitimate business justification for its conduct, the plaintiff cannot prevail on its § 2 claim. *Id.* at 604-05, 608. Moreover, even the complete denial of access to an essential facility — though there was no such denial here — does not violate § 2 if there is a legitimate business justification for the denial. *See* Areeda, "Essential Facilities: An Epithet of Limiting Principles," 58 Antitrust L.J. 841, 852 (1989) ("denial of access is never *per se* unlawful; legitimate business purpose always saves the defendant").[42]

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[42]*See also* District Court Findings of Fact, ¶ 7.2 (Pet. App. at 42); *City of Anaheim, supra*, 955 F.2d 1381 ("If the Pacific Intertie were an essential facility, Edison could still deny access if it had legitimate business reasons for the denial").

a. Vernon's Petition misstates the "business justification" ruling challenged here.

Vernon's Petition misstates the business justification ruling of the Ninth Circuit, and misapplies the legal parameters of the legitimate business justification analysis. The Ninth Circuit's "business justification" analysis in this case does not entail "protecting a monopolist or its customers from potential adverse affects of competition." (Pet. at 13). As developed above, "competition" plays no part in the increase in retail rates that would result from acceding to Vernon's demand. Vernon has never even attempted to explain why an unwarranted shift of benefits from one group of customers to another would benefit competition, or would be inconsistent with the conclusion that Edison was doing anything other than attempting to "protect itself against loss by operating with superior services, lower costs and improved efficiency." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973).[43]

b. The Ninth Circuit's ruling does not conflict with Supreme Court decisions.

None of the Supreme Court authorities cited by Vernon undermines the Ninth Circuit decision that "[i]t was legitimate for Edison to refuse access that will affect its rates to the detriment of its customers." 955 F.2d 1366 n.10 (Pet. App. at 10).

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) involved an agreement among engineers which operated as an "absolute ban on competitive bidding," thus having the effect of maintaining higher price levels. Indeed, the proffered "business justification" for this agreement was to prevent low bids. 435 U.S. 693. Here, of course, Edison's business justification was not to increase price. Rather, as is undisputed

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[43]Moreover, as demonstrated by Vernon's total failure to cite to any evidence, there was no showing, nor any argument, that the "refusal" to provide pro rata access was for the purpose of "restraining competition in the relevant [power] markets." (Pet. at 18).

here, "retail customers would pay increased rates if Vernon received the access sought — indeed Vernon's damages study reflected that fact." 955 F.2d 1366 (Pet. App. at 10).

The ruling below does not in any sense constitute "a frontal assault on the basic [competition] policy of the Sherman Act." *National Society of Professional Engineers*, 435 U.S. at 695. True competition contemplates a competitor using, in the most efficient way possible, its own resources to produce lower prices and better services for all of its customers. That is precisely what Edison is seeking to do by using its own transmission facilities. To confiscate a portion of one competitor's facilities to give it to another competitor does not assist competition, but serves as a subsidy to that competitor — which is the antithesis of competition.

Vernon alternatively argues (Pet. at 16) that under Supreme Court decisions "a monopolist's exclusionary conduct is not excused because a competitor can still buy the monopolist's products." This argument is based upon a misstatement of the record and the Court of Appeals' decision here, and the law generally. Vernon has not, despite its suggestion, been the victim of any price-gouging by Edison. All of Edison's resale rates to Vernon are at regulated prices, based upon actual cost of services and approved by the FERC. The supply to Vernon of all of the power it requires at FERC approved prices itself belies its claim that it has been denied reasonable access to transmission service. *See City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 649 (10th Cir. 1992), *petition for cert. filed* (Jan. 25, 1992) ("As a matter of law, we find that Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines," thus defeating any essential facilities claim).

Finally, despite Vernon's contention to the contrary, both the Court of Appeals (Pet. App. at 11) and the District Court (Pet. App. at 43) properly addressed this Court's opinion in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). Edison's conduct in affording Vernon, as well as the other resale Cities, transmission service over its network whenever space is available sharply distinguishes its conduct from that challenged by the plaintiff in *Otter Tail*. In *Otter Tail*, the electric utility defendant refused to supply wholesale power *and* refused to wheel any power

to its wholesale customers, despite available transmission space on its lines. 410 U.S. at 371. There was further evidence that the defendant was actively pursuing a plan to take over the municipal distribution systems lying within its control area whenever possible. *Id.* at 372. There is no such evidence in this case which could cast doubt on the validity of Edison's proffered business justifications.

c. Vernon's Petition misapplies the legal parameters of the legitimate business justification analysis.

Vernon incorrectly asserts (Pet. at 17) that Edison bears the burden of proving the validity of its business justification. The business justification concept is not an "affirmative defense" but is an essential element of a Section 2 case. As the Court of Appeals properly ruled, the § 2 antitrust *plaintiff bears* the burden of proving that the defendant's conduct is not supported by legitimate business concerns. 955 F.2d 1366 (Pet. App. 10), *citing Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 620 & n.9 (9th Cir. 1990), *aff'd, sub nom., Eastman Kodak Co. v. Image Technical Serv., Inc.*, ____ U.S. ____, 112 S. Ct. 2072 (June 8, 1992); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1338-39 (9th Cir. 1983).

Vernon's reliance (Pet. at 17) on *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 113 (1984), is misplaced. There the Court was dealing with an unreasonable "restraint of trade" under § 1 of the Sherman Act. As the Court of Appeals recognized, in a § 1 case, the defendant bears the burden of proving a legitimate business justification for a concerted restraint of trade. 955 F.2d 1370 (Pet. App. at 17-18). In a § 2 case, however, the plaintiff has the burden of proving the defendant acted without a legitimate business justification. *Id.*, 955 F.2d 1366 (Pet. App. at 10), *citing Image Technical*, 903 F.2d 620 n.9.[44]

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[44]The language quoted (Pet. at 17) from the Supreme Court's opinion in *Eastman Kodak Co. v. Image Technical Serv. Inc., supra,* — *i.e.*, that the Court could not conclude as a matter of law that the "anticompetitive effects of Kodak's behavior are outweighed by its competitive

In any event, here the burden of proof issue was mooted because Vernon agreed with Edison that "the sufficiency of Edison's proffered business justification is a matter of law and is thus appropriate for resolution pursuant to Edison's Foreclosure Motion."[45] Because Vernon affirmatively embraced this principle up through the District Court's ruling on Edison's summary judgment motion, Vernon did not even attempt to offer evidence contravening the facts underlying Edison's business justification in its response to Edison's pleading.[46] Thus, regardless of the burden of proof, there was no evidence introduced by Vernon that would create an issue of fact on the business justification issue.

Contrary to Vernon's assertions (Pet. at 18-19), under the applicable legal precedent, the admitted economic harm to Edison's other customers is a sufficient business justification precluding Edison from liability under the antitrust laws. Indeed, the relevant case law provides that both economic and technical constraints will constitute the requisite "infeasibility." In *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the Seventh Circuit suggested that if the antitrust defendant demonstrated "legitimate business *or* technical reason[s]" for its denial of the plaintiff's access to its telephone exchange facilities, the defendant would

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effects" — does not relate not to a plaintiff's burden in a § 2 case. Instead it addresses Kodak's claim that it was entitled to a legal presumption that the asserted procompetitive effects of a § 1 tying arrangement outweighed the anticompetitive effects, despite the presence of factual issues as to the validity of the claimed business justifications. *Eastman Kodak Co. v. Image Technical Serv. Inc., supra*, 112 S. Ct. 2088-89. Of course, here, the Ninth Circuit, in contrast to its decision in *Image Technical Serv. Inc.*, determined there was no factual dispute as to Edison's asserted legitimate business justification. 955 F.2d 1366 (Pet. App. at 10).

[45]District Court Findings Of Fact ¶ 4.4 (Pet. App. at 38); *see also* CR 196 at 3, Issue No. 4; *see also id.* at 3A, Issue Nos. 5, 12-13.

[46]*See* Court of Appeals opinion, 955 F.2d 1366 (Pet. App. 10) ("as noted by the district court, Vernon did not point to any facts in opposition to Edison's motion for summary judgment which would create a material issue of fact").

not have violated Section 2. *Id.* (emphasis added). *See also Image Technical Serv., Inc. v. Eastman Kodak Co., supra*, 903 F.2d at 620; *Laurel Sand & Gravel Inc. v. CSX Transp. Inc.*, 924 F.2d 539, 545 (4th Cir. 1991), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 39 (1992) (where granting access to an essential facility would alter the nature of defendant's existing business, it had a legitimate business justification for not acceding to the access request).[47]

d. The Ninth Circuit decision does not permit "monopoly to beget monopoly."

Vernon alternatively argues the Ninth Circuit decision falls afoul of a theory of "monopoly abuse." (Pet. at 19-20). The argument is presumably predicated on an assertion that Edison misused its monopoly power over its own transmission lines to gain a competitive advantage or impair competition in bulk power markets. Vernon, of course, did not compete with Edison in the transmission of electric power; Vernon instead purports to have competed with Edison in the *purchase* (but not the sale) of power in separate bulk power markets.

Vernon's reliance on *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951), to support its "monopoly leveraging/monopoly abuse" theory is misplaced. As this Court underscored in *Aspen Highland Skiing, supra*, 472 U.S. 608, a monopolist's qualified right to refuse to deal with a competitor, as discussed in *Lorain Journal*, is to be viewed in reference to whether the refusal was justified by any "legitimate business justification." In *Lorain Journal*, the would-be monopolist (a newspaper) had no legitimate reason for refusing to sell advertis-

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[47]As the District Court ruled below, even a complete denial of access to an essential facility is not an antitrust violation provided there is a legitimate justification for the refusal. *See Becker v. Egypt News Co.*, 713 F.2d 363, 366 (8th Cir. 1983); *Venture Technology, Inc. v. National Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78,169 (W.D.N.Y. 1981), *rev'd on other grounds*, 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982). *See generally* Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986).

ing to those who patronized a competitor. Lacking any such legitimate reason for the refusal, the newspaper was viewed as having the predatory aim to "destroy its small competitor." *Lorain*, 342 U.S. 154; *Aspen Highlands*, 472 U.S. 608. Here, the rulings of a legitimate business justification — based as they were on facts admitted by Vernon — distinguish this case from *Lorain* and, as a matter of law, defeat any claim of "monopoly abuse."

e. The Ninth Circuit decision does not conflict with the decisions of other circuits.

Vernon cannot support factually or legally its argument (Pet. at 21-22) that the Ninth Circuit decision conflicts with the decisions of other circuits. As in earlier arguments, Vernon begins its discussion here by a mischaracterization of the issue addressed by the Ninth Circuit. The issue is not, as Vernon frames it (Pet. at 21), whether one who controls an essential facility must "share it fairly with competitors." The question is whether "fair sharing" required the owner of the facility to forego its own use of its facilities to the detriment of its customers so that a purported competitor can use it.

None of the cases cited by Vernon conflicts with the district court's and the Ninth Circuit's opinions analyzing the fair access issue. The Ninth Circuit appropriately addressed the Seventh Circuit's holding in *MCI Communications v. American Tel. & Tel. Co., supra*, 708 F.2d 1133. As the Ninth Circuit stated, "[t]his is not a situation where Edison had no use for the facility and arbitrarily denied someone else access to it." 955 F.2d 1366 (Pet. App. at 10.) This distinguishes the instant case from the facts supporting § 2 liability in *MCI Communications*. There AT&T denied requested interconnections to its telephone exchange facilities even though there was "no legitimate business or technical reason" for the refusal and AT&T was not asked to "in any way" abandon its facilities. 708 F.2d 1133.

Also distinguishable is *Delaware & Hudson Ry Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ____ U.S. ____, 114 L.Ed. 125 (1991), where, as Vernon states (Pet. at 22), access was offered "on unreasonable terms." Here, of course, the rulings challenged are predicated on the absence of

any triable dispute as to "legitimacy" and hence "reasonableness" of Edison's refusal to grant Vernon the "relative share firm access" assumed by its damage study.

Finally, the language Vernon quotes from *City of Mishawaka v. American Elec. Power Co. Inc.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (Pet. at 23), has been taken out of context. The Court of Appeals there was referring to the "trial court's view" that the utilities' admittedly unduly discriminatory rate filings were not protected by the *Noerr-Pennington* doctrine because the utilities' conduct (*e.g.*, threatening the future wholesale supply of the municipalities, acquisition of municipalities in distress) suggested a "specific intent" to monopolize. *Id.* at 981-83. Here, of course, Vernon does not now contend that Edison's rates to Vernon were unduly discriminatory or predatory. Indeed, as the district court below found, if Edison had acceded to grant Vernon "relative share firm access," it would have resulted in "discrimination in favor of wholesale customers and against the retail customers." District Court Findings Of Fact, ¶ 3.18 (Pet. App. at 37).

f. The Ninth Circuit decision is in accord with several recent circuit court decisions.

The Court of Appeals decision here is well in line with a substantial body of recent circuit court decisions dismissing § 2 claims alleging denial of access to essential facilities.

In *City of Chanute, Kan. v. Williams Nat. Gas Co., supra*, 955 F.2d 641, the Tenth Circuit affirmed summary judgment in favor of a pipeline owner on § 2 action against it by eight cities who were denied access to the pipeline (an asserted "essential facility") for the transportation of gas purchased from third parties. The cities specifically sought damages from Williams for the time it closed its pipeline to the transportation of gas from third parties. The court stated: "As a matter of law, we find Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines." *Id.* at 649.[48] The court also affirmed

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[48] *See also Town of Concord, Mass v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 113 L.Ed.2d 268

summary judgment dismissal of the Cities' § 2 monopolization claim, ruling that the pipeline closure to third party gas was not motivated by anticompetitive intent but rather by Williams' "legitimate business concern" over its "own take-or-pay liability" and the desire "to prevent conversion of sales service to transportation." *Id.*, *citing Illinois ex rel. Burris v. Panhandle Eastern Pipe Co.*, 935 F.2d 1469, 1485 (7th Cir. 1991), *cert. denied*, ____ U.S. ____, 117 L.Ed.2d 415 (1992).[49]

In *Laurel Sand & Gravel Inc. v. CSX Transp. Inc.*, *supra*, 924 F.2d 549, the Fourth Circuit affirmed a summary judgment dismissal of § 2 action by a sand/gravel distributor and shortline railroad against a national railroad for its refusal to grant trackage rights to its railroad, an asserted "essential facility." The court there ruled the defendant-railroad asserted a legitimate business justification for denying the access request, which, if granted, would have altered the nature of defendant's existing business. *Id.*

In *Alaska Airlines Inc. v. United Airlines Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 118 L.Ed.2d 316 (1992), the Ninth Circuit affirmed summary judgment in favor of defendant airlines who were charged with "leveraging" their control over the computerized reservation systems (CRS) — a claimed "essential facility" — to gain a competitive advantage in the downstream air transportation market. The Ninth Circuit rejected plaintiff's argument that § 2 liability could be imposed even if there was no monopolization of the down-stream market. The Ninth Circuit read *Otter Tail* as an "extreme case" in which the " 'upstream' monopolist," Otter Tail, "baldly refused to deal with its potential " 'downstream competitor' " — thus "eliminat[ing] all possibility of competition in the downstream

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(1991) ("regulation significantly diminishes the likelihood of major antitrust harm").

[49]The Tenth Circuit, relying on *Panhandle Eastern Pipe Co.*, thus distinguished *Otter Tail* as "inapplicable to the facts of this case as some of the Cities have effective toll requirements contracts with Williams and Williams was subject to regulations that required it to transport third party gas to the Cities." *Id.*

market . . . for 'retail' electric services." *Id.* at 543.[50] This interpretation of *Otter Tail* accords perfectly with that of the Court of Appeals decision challenged here. *See also Rural Telephone Service Co. v. Feist Publications Inc.*, 957 F.2d 765, 769 (10th Cir. 1992).

IV.

CONCLUSION

For the foregoing reasons, Edison requests that this Court deny Vernon's petition for a writ of certiorari to the United States Court of Appeal for the Ninth Circuit.

DATED: August 20, 1992

Respectfully submitted,

GIBSON, DUNN & CRUTCHER
SOUTHERN CALIFORNIA EDISON COMPANY

By: PAUL G. BOWER
Attorneys for Respondent

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[50]The Court also rejected the "monopoly leveraging" doctrine as an independent theory of liability under § 2: "Even in a two market situation, a plaintiff cannot establish a violation of Section 2 without proving that defendant used its monopoly power in one market to obtain, or attempt to attain, a monopoly in the downstream, or leveraged, market." *Id.*